IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 51 OF 2002

Francisco Jesus Hilario D' Cruz,
r/o. Borda, Margao, Goa, and
at present in London, England. ..... Appellant

V e r s u s

1. Lilia Pereira e Coutinho (now deceased)
2. Shri Fernando Coutinho (now deceased)
   represented by their legal representative
3. Shri Lyndon Coutinho
   St. Joaquim Road, Borda, Margao, Goa. ..... Respondents

Shri A. F. Diniz, Advocate for the Appellant.

CORAM:- N. A. BRITTO, J.

DATE:- 29th June, 2006

ORAL JUDGMENT

Heard Shri A. F. Diniz, the learned Counsel on behalf of the appellant who was the plaintiff in Special Civil Suit No. 248/97/II. This second appeal was admitted on 13.06.2003 on two substantial questions of law, one of which reads as follows:

1. Whether a preliminary decree ought to have been made and an inquiry be ordered to be held to assess the mesne profits from the date of the institution of the suit until the delivery of possession to the decree holder and thereupon a final decree be made?

2. The respondents/defendants have chosen not to contest this second appeal. There is no dispute that the defendants were occupying the eastern portion of the house belonging to the plaintiffs. It was the allegation of the plaintiff that four rooms of the western portion were in possession of the plaintiff but when the plaintiff returned from England in January 1990 or thereabout and went to the said western portion, he found that the defendants had tampered with the locks of the said western portion. The plaintiff therefore filed the said Civil Suit, inter alia, praying for permanent injunction to restrain the defendants from entering the western portion of the said residential house and in the alternative in case the defendants were found in possession of the said western portion, with a prayer for vacant possession of the said western portion. The plaintiff also prayed that a sum of Rs.1200/- per month be paid to the plaintiff for the illegal occupation of the said western portion by the defendants from the

date of the filing of the suit till the possession of the western portion, was handed over to the plaintiff. The trial Court framed several issues but admittedly did not frame any issue as regards the said compensation or mesne profits sought by the plaintiff. However, the learned trial Court found that the claim of the plaintiff for Rs.1200/- per month would be too excessible.. The learned trial Court also observed that the plaintiff had not led any evidence as to how the plaintiff was entitled to damages. The plaintiff preferred an appeal to the District Court and the learned Addl. District Judge went a step further and observed that the learned trial Judge should not have made any observation about the damages whether they were excessive or not without ascertaining as to whether the plaintiff was entitled to mesne profits or not.

3. Section 2(12) of the Code of Civil Procedure defines mesne profits to mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. Order 20 Rule 12 provides for decree for possession and mesne profits. Sub-rule (1) further provides that;

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-

(a) .....

(b) .....

(ba) for the mesne profits or directing an inquiry as to such mesne profits.

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until-

(i) the delivery of possession to the decree-holder,
(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
(iii) the expiration of three years from the date of the decree, whichever event first occurs.

Sub-rule (2) further provides that,

(2) Whether an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

Admittedly, although the plaintiff claimed the mesne profits from the date of the suit, the learned Trial Court did not frame any issue in that regard and presumably because the claim as regards mesne profits was included by way of amendment. On behalf of the plaintiff, reliance has been place on ***Gopalakrishna Pillai & Ors. v. Meenakshi Ayal & Ors. (AIR 1967 S.C. 155)***, wherein the Apex Court observed as follows :-

> "Order 20, R.12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of institution of the suit. In view of O.7, Rr. 1 and 2 and O.7, R.7 of the Code of Civil Procedure and S. 7 (1) of the Court Fees Act, the plaintiff must plead the cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon. With regard to future mesne profits the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain

relief in respect of this future cause of action only in a suit to which the provisions of O. 20, R. 12 apply. But in a suit to which the provisions of O. 20, R. 12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits, and the Court may grant this general relief, though it is not specifically asked for in the plaint, see Basavayya v. Guruvayya, ILR (1952) Mad 173 at p. 177: (AIR 1951 Mad 938 at p. 940) (FB). In Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal, (1882) ILR 8 Cal 178 at p. 189 (PC), Sir R. P. Collier observed:

"The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due; but be that at it may, they are of opinion that, under S. 196 of Act VIII of 1859, it was in the power of the Court if it thought fit, to make a decree which should give the plaintiff wasilat up to the date of obtaining possession."

> Section 196 of Act VIII of 1859 empowered the Court in a suit for land or other property paying rent to pass a decree for mesne profits from the date of the suit until the date of delivery of possession to the decree-holder. The observations of the Privy Council suggest that in a suit to which S. 196 of Act VIII of 1859 applied, the Court had jurisdiction to pass a decree for mesne profits though there was no specific claim in the plaint for future mesne profits. The Court has the like power to pass a decree directing an enquiry into future mesne profits in a suit to which the provisions of O.20, R.12 of the Code of Civil Procedure, 1908, apply. ”

4. The plaintiff had prayed for mesne profits as regards which no issue was framed and without any evidence being led in that regard, the issue was foreclosed. The plaintiff filed an appeal and restricted the appeal only as regards the said mesne profits. However, the learned Appellate Court came to the conclusion that the plaintiff was in possession of the western portion as held by the trial Court and hence was not entitled to mesne profits. The learned Appellate Court lost sight of the fact that the learned trial Court had held the defendants' claim of being in possession of

the entire house as not proved and not only that had in terms of prayer (b) directed the defendants to remove their belongings from the western portion of the suit house. Since no issue as regards mesne profits was framed at all, nor the plaintiff given an opportunity to lead evidence in that regard, both the Courts below ought to have ordered an inquiry into the said mesne profits as required under O.20, Rule 12. It would therefore be in the interest of justice in case an inquiry is conducted as regards the said mesne profits in terms of O. 20 R. 12 C.P.C. To that extent only, the Judgments/Orders of both the Courts below are hereby set aside and the learned trial Court is hereby directed to conduct an inquiry in terms of O.20 R. 12 C.P.C. with notice to the respondents and decide the claim of the plaintiff regarding the said mesne profits in accordance with law after giving opportunity to both the parties to lead evidence on the said issue.

5. Substantial question is answered in the affirmative and in favour of the plaintiff. Appeal allowed on the above terms with no order as to costs.

N. A. BRITTO, J.

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